SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1372

ROBERT C. COTTEN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Robert C. Cotten, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit denying his second petition for re-hearing.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, originally affirming petitioner's conviction is reported at 392 F. 2d 344 (4th Cir. 1968). The opinion of the Court on the second petition for rehearing has not yet been reported and is reprinted as an appendix to this petition.

JURISDICTION

The petitioner and five others were convicted in the United States District Court for the Eastern District of Virginia in January of 1967 for violating 18 U.S.C. §§ 371, 1952 and sentenced to a term of imprisonment. The United States Court of Appeals for the Fourth Circuit, one judge dissenting, affirmed the conviction. 392 F. 2d 344 (4th Cir. 1968). This Court denied certiorari, 392 U.S. 932 (1968), at the same time noting probable jurisdiction in *United States* v. *Nardello,* 392 U.S. 923 (1968). Based upon the subsequent decision of this Court in *Nardello,* 393 U.S. 286 (1969), petitioner sought and was given leave to file a second petition for rehearing in the Court below and bail pending its outcome was granted. The judgment of the Court below denying the second petition for rehearing, one judge dissenting, was entered on April 8, 1969.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The facts of the case are succinctly set forth by the Court below in its original opinion and, in the interest of brevity, are adopted here.

"Involved here is a scheme by certain partners in a real estate development company (Nathan Wechsler, Sigmund Goldblatt, George Faigen, and Seymour Faigen) to bribe two members of the Board of Super-

[1] Involved in the proceedings below were three other defendants, Nathan Wechsler, Sigmund Goldblatt and A. Claiborne Leigh, each of whom, we are advised, is filing a separate petition in this Court. We ask the Court to consider them together and we adopt and rely upon the arguments to be made by the three other petitioners.

visors of Fairfax County, Virginia, (Robert Cotten and Claiborne Leigh) to vote for the re-zoning of land in which the partnership was interested. * * *

"In 1960, the developer-defendants were interested in procuring a zoning change from residential to mobile homes for 84.3 acres of land in Fairfax Count which they wanted to use as a trailer park. Sufficient evidence was introduced at trial for the jury to find the following facts. On March 9, 1960, George Faigen filed an application for the re-zoning. A year later, but before the Board of Supervisors had acted upon the application, the four defendant-partners placed a check for $5,500 in escrow in the Security Bank of Washington for John C. Somers, an attorney who often handled zoning cases in Fairfax County on a contingent fee basis, conditioned upon favorable action by the Board. Two months later, on July 26, 1961, the Board acted favorably on Faigen's application on the affirmative votes of Leigh, Cotten, DeBell and another. On August 7, the developer-defendants instructed the Security Bank to release the $5,500 check to Somers who deposited it to his own account on August 18, the day on which he was notified by the bank. Somers was instructed by Leigh to run the check through his own account and then make out a check for the same amount to Leigh, and did so. Somers had performed no work for developer defendants at any time, and in 1961 he knew none of them except Goldblatt. Leigh deposited the check to his account on August 19, and on August 22 he wrote a check to [Supervisor Stuart T.] DeBell [acquitted in the trial court] for $1,308.33; on August 23, he wrote a check to himself for $1,333; and on September 9, he wrote a check to Cotten for $1,000. Cotten's secretary entered the $1,000 check as a legal fee in

Cotten's checkbook and receipts book and deposited the check to Cotten's account on September 15. On September 13, 1961, Congress enacted 18 U.S.C. § 1952. Because the state courts of Virginia set aside the original Board action, it was necessary for George Faigen to file a new application on June 20, 1962. This second application was considered by the Board on July 25, 1962, and again it was approved, this time on the affirmative votes of Cotten, Leigh, DeBell, and two others. Three letters, two by Goldblatt and one by George Faigen, connected with the effort to procure the re-zoning were mailed on June 17 and 18 and on July 21, 1962." 392 F. 2d 344, 345-346 (4th Cir. 1968).

Supervisor A. Claiborne Leigh and this petitioner were convicted as were four of the developer defendants and the convictions were affirmed by the Court below. *United States* v. *Wechsler,* 392 F. 2d 344 (4th Cir. 1968). This Court denied certiorari, 392 U.S. 932 (1968), and denied a petition for rehearing, 393 U.S. 902 (1968).

REASONS FOR GRANTING THE WRIT

Both the original opinion of the Court below and its opinion on rehearing are, as the dissenting judge points out, squarely at odds with this Court's holding in *United States* v. *Nardello,* 393 U.S. 286 (1969). Throughout *Nardello,* this Court has made clear that the unlawfulness of an activity under the Travel Act, 18 U.S.C. § 1952, is to be measured by state law. So measured, it is clear that the conduct which was brought into question by the indictment in this case had been been completed prior to the enactment of Section 1952 and, accordingly, no federal law was violated by the petitioner.

The indictment was brought under 18 U.S.C. § 1952 (a)(3) and it charged the defendants with using interstate facilities "to establish and carry on and facilitate the establishment and carrying on of an unlawful activity by the bribery of officers of the State of Virginia in violation of the laws of the State of Virginia: to-wit, 18.1-278 and 18.1-279 of the Code of Virginia." Those sections of the Virginia Code make the promise, offer, or gift to, or the acceptance by, a public official the criminal act of bribery. The highest court of Virginia has authoritatively held that the criminal act under this statute is completed upon the giving, offering or promising of such bribe, notwithstanding that the official act to be done in consideration therefor is to occur in the future. *Ford* v. *Commonwealth,* 177 Va. 889, 15 S.E. 2d 50 (1941). The state crime of bribery, and necessarily the crime under Section 1952, was completed no later than sometime in August of 1961, at which time the $5,500 check was released to Supervisor Leigh. Since the Travel Act was not passed until September 13, 1961, no federal crime was violated at the time the bribery was committed.[2]

The trial court time and time again instructed that the defendants were charged with "illegally obtaining a zoning". The Court below compounded that error by holding that the duration of the bribery prohibited by the Virginia statute continued until "the zoning corruption was accomplished". This flies squarely in

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[2] It is to be noted that the defendants were *not* indicted under Section 1951(a)(1) for distributing the proceeds of an unlawful activity. Such an indictment might have withstood attack in view of this petitioner's deposit of the check *after* the effective date of the statute. We are not here concerned with that situation because that is not the manner in which the grand jury returned the indictment.

the face of *Ford* v. *Commonwealth, supra,* which specifically holds that the statute "prohibits three specific acts—the giving of a bribe, the offer of a bribe, and the promise of a bribe, *any one of which is a complete crime in itself.*" (Emphasis supplied) If, as *Nardello* teaches, the unlawful activity proscribed by Section 1952(a)(3) is to be judged by the scope of the activity prohibited by the underlying state law, this petitioner's crime had been completed prior to the time the Travel Act became effective. It follows, therefore, that since the crime of bribery under Virginia law was complete upon either the agreement or acceptance, irrespective of whether the improper official act had yet been taken, the object of the conspiracy charged in the Indictment was fully accomplished. And, "[W]hen the object of a conspiracy has been fully accomplished, no act subsequently done can *possibly* be an act done to effect the object of the conspiracy." *Rose* v. *St. Clair,* 28 F. 2d 189, 191 (D.C. W.D. Va. 1928); *Lonabaugh* v. *United States,* 179 Fed. 476, 481 (8th Cir. 1910); *DeLuca* v. *United States,* 299 Fed. 741, 745 (2d Cir. 1924); *United States* v. *McGee,* 108 F. Supp. 909, 912-913 (D.C. Wyo. 1952), and cases cited.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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May 8, 1969